LEE YEW v. PUBLIC PROSECUTOR

[A. Cr. J. (Bellamy, J.) July 31, 1953]

[Seremban — Criminal Appeal No. 2 of 1953]

Town Boards Enactment (Cap. 137), s. 92(i)(c) — Erection of unauthorised building — Demolition order — Offender must be given opportunity of being heard — Principles under which discretion to make an order should be exercised.

The accused was charged with erecting a temporary building without the written approval of the Chairman, Town Board, Seremban, to which he pleaded guilty. Further, on the application of the Health Inspector who conducted the case, the Magistrate ordered the building to be demolished. Against this order the accused now brings this appeal on the grounds (1) that he was unaware of the application for the demolition order; (2) that he was given no opportunity of being heard on the application; (3) that the Magistrate did not exercise his discretion properly.

Held: (1) under the provisions of section 92(i) of the Town Boards Enactment the application for a demolition order must be made by the Chairman or Deputy Chairman of the Board; (2) it is contrary to fundamental justice to make such an order without giving the offender some notice of the application and an opportunity of being heard; (3) in the exercise of his discretion whether or not to make an order, the Magistrate should consider the true object of the Enactment, and the arrangements which can be made in most cases so that they do not press unduly upon the person who is subjected or will be subjected, to such an order.

Case referred to:—

(1) *R. v. Bolton Recorder, ex parte McVittie* (1939) 4 All E.R. 236 at p. 239.

MAGISTRATE'S APPEAL.

J. A. B. Lang for the appellant.

L. A. Massie (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Bellamy, J.: — In this case a summons was issued by the Magistrate at Seremban at the instance of the Town Board, Seremban against the accused charging that he, "on 30th October 1952 did erect the wooden framework of a temporary building, measuring 30' x 24' on Lot 321, Lobak, Seremban, at the back of 75, Lobak, Seremban, without the written approval of the Chairman, Town Board, Seremban," in contravention of By-law 2 in Part I of the By-laws made under section 16 of the Town Boards Enactment (Cap. 137) and punishable under section 92(i)(c) of the same Enactment. The accused pleaded guilty to the charge, and was convicted and sentenced to pay a fine of $30, and, in default of payment of the fine, he was ordered to suffer rigorous imprisonment for 15 days. Furthermore, on the application of the Health Inspector who conducted the case on behalf of the Board for a demolition order, the Magistrate ordered the building referred to in the summons to be demolished on or before 1st March, 1953. The accused now brings this appeal against the demolition order, his complaints being, firstly, that he was unaware that a demolition order had been applied for until after the order had been made; secondly, that he was given no opportunity of being heard on the application for a demolition order; and, thirdly, that the Magistrate did not consider the application for a demolition order judicially with a view to a proper exercise of his discretion.

It is unfortunate that I have not had the advantage of having all the facts of the case properly before me. The record of the proceedings before the Magistrate is so scanty and unsatisfactory that at one time I considered it necessary to enable me to decide the case to have further evidence. But, having regard to the way in which this enactment is worded and to the importance of not going beyond what is absolutely necessary to be decided, I think I am in a position to come to a decision without the necessity of ordering further evidence to be taken.

The language of sub-section (i) of section 92 of the Town Boards Enactment (Cap. 137) is that any person, having failed to comply with the provisions of the Enactment or of any of the building by-laws or with any lawful order or written direction of the Board, is liable to a fine, "and a Magistrate may, on the application of the Chairman, make an order requiring such person to alter in any way or demolish the building."

It is conceded by both sides, and I agree, that the word "may" in this sub-section is permissive and not mandatory. It confers on a Magistrate a discretion to make an order either requiring an offender to alter the building in any way or requiring him to demolish it.

To my mind, the next question which arises on the interpretation of this sub-section is, when may a Magistrate exercise this discretion? The language of the sub-section provides the answer. It is clear, in my judgment, that the necessity for its exercise can only arise "on the application of the Chairman".

"Chairman" is defined in section 2 of the Town Boards Enactment as follows:—

"'Chairman' means the officer for the time being lawfully performing the duties of the office of Chairman of a Town Board, and includes a Deputy Chairman;".

I can find nothing in this Enactment which enables the Chairman of a Town Board or his Deputy to delegate to any other officer of the Board the powers conferred upon him by this Enactment, and in my opinion a Magistrate has no jurisdiction to make an order either requiring an offender to alter the building in any way or requiring him to demolish it except upon the application of the Chairman or Deputy Chairman of the Board. The object of this provision seems to

me to be a very sensible one. The Town Boards Enactment and the by-laws thereunder impose a number of executive duties on the Chairman of a Town Board who exercises those functions on behalf of the Government of the State in accordance with the advice of the Board. One of the powers of the Board is the prohibition of the erection of a building of a particular class, design or appearance in a particular district or locality within the Town Board area, and in the exercise of this power the Board through its Chairman has the discretionary power of ordering an offending building to be altered to conform with the Board's requirements or to be pulled down. This power of the Board is a highly penal one and those who exercise such a power are bound to act strictly within it. The practical effect of the provisions of sections 4 to 11 of this Enactment and the by-laws relating to the conduct of the business of the Board is, of course, that when a complaint is made against the owner of a building such a complaint is investigated by the Board or a committee of the Board appointed for the purpose, and it is upon their advice that the Chairman exercises his powers of applying to the Magistrate for an order either for an alteration of the building or its demolition. Where, therefore, such an application by the Chairman is made to a Magistrate he knows that the matter has been considered by the Board upon whose advice the Chairman is acting.

In this case, I find that the application for a demolition order was made, not by the Chairman or Deputy Chairman, but by a Health Inspector. There is nothing on the record to show that the application was authorised by the Chairman or Deputy Chairman. In my opinion, for the reasons I have stated, the Magistrate had no jurisdiction to make the demolition order which he did make.

This brings me to the question of the exercise by the Magistrate in this case of his discretion to make a demolition order under section 92(i)(c) of this Enactment. The record shows clearly that the accused was not given an opportunity of being heard on the application by the Health Inspector for a demolition order. There is also nothing on the record to show that the accused had prior notice that such an application was to be made. Although it may well have been appended to the summons, a copy of which is not before me. It is in my view contrary to fundamental justice to make such an order without giving the offender some notice of the application and an opportunity of being heard. Notice of the application could conveniently be given by appending it to the summons or at the hearing itself; but if the first intimation the accused has of the application is at the hearing he should be given a reasonable opportunity, by a postponement if need be, of answering it. In this case, the Magistrate did not give the accused an opportunity of being heard and, in my opinion, in omitting to do so he misdirected himself and his subsequent order requiring demolition of the building cannot be sustained.

I have been asked to state what principles should guide a Magistrate when considering the exercise of his discretion under this sub-section. I recognise that this is a somewhat difficult question, and the point is destitute of authority. There is no analogy to be found in the Public Health Acts of England. I rather hesitate to name any general principles which should guide a Magistrate in the exercise of his discretion under this sub-section. Each case necessarily must depend on its own particular facts. However, I cannot do better, I think, than to adopt respectfully as my own the language of Scott, L.J. in *R. v. Bolton Recorder, ex parte McVittie*[1], a case under the English Public Health Act, 1936, that this Enactment should be worked with a reasonable spirit of appreciating its true object, and arrangements can be made in most cases so that they do not press unduly upon the person who is subjected, or will be subjected, to such an order. In these days of acute housing shortage, if the harshness of displacing people and forcing them to go further afield to find dwelling houses or to escape the congestion of the towns can be avoided without conflicting with the general policy of the Enactment by making an order requiring the owner to alter the building to conform to local requirements, then I should say that such an order should be made in preference to a demolition order.

I allow the appeal. The demolition order is set aside. The Chairman of the Town Board, Seremban is at liberty to make a fresh application to a Magistrate under the provisions of section 92(i)(c) of the Enactment. I think it would be more satisfactory if the matter were to go before another Magistrate. The Magistrate should exercise his discretion as he thinks fit bearing in mind what I have endeavoured to express.

I ought to add one thing. I think more care should be taken in framing charges under this Enactment and the by-laws made thereunder. The wording of the section or by-law should be followed, and full particulars should be given. In the charge in the present case there is no indication that the land upon which this building was erected, Lobak, is within the Seremban Town Board area, and the subject matter of the charge is described as a "temporary building" in respect of which class of building quite different by-laws apply.

Appeal allowed.

LIM THIAN HEN & ORS. v. REGINA; TAN BENG SENG v. REGINA; CHUA AH SENG v. REGINA.

[C. Cr. A. (Murray-Aynsley, C.J., Brown and Buttrose, JJ.) May 14, 1953]

[Singapore — Criminal Appeals Nos. 1, 2 and 4 of 1953]

Penal Code, s. 397 — Armed robbery — Sentence of whipping.

The appellants who had been convicted of armed robbery had been sentenced to whipping in addition to their sentences of imprisonment.

Held: (1) the sentence of whipping should be imposed only where there is evidence of a substantial degree of actual physical violence; (2) in the cases before the Court the degree of violence employed was not such as to justify a sentence of whipping.

CRIMINAL APPEAL.

Appellants in person.

H. B. Livingstone (Crown Counsel) for the respondent.

Cur. Adv. Vult.

The judgment of the Court of Criminal Appeal was delivered by :—

Murray-Aynsley, C.J. : — These are three appeals, in the first of them the appellants were convicted of armed gang robbery, in the other two, of armed robbery. In the first case there was an appeal against conviction only. We consider that there was insufficient evidence that five persons took part in the robbery, and in consequence we are of the opinion that the conviction should have been of armed robbery only. We amend the conviction accordingly and this opens the question of sentence for consideration. It is convenient that the three cases should be considered together.

Certain general observations may be made. Every robbery, armed or otherwise, is a very serious offence and must be punished with a long term of imprisonment. In addition the law provides that sentences of whipping may be imposed. We consider, however, that such sentences should only be imposed in cases of a certain type. It is not possible to define in exact terms the dividing line between cases in which sentence of whipping should or should not be imposed. We wish, however, to give certain indications with a view to securing a measure of uniformity in the Courts of the Colony.

Every case of robbery involves violence to a certain extent. We consider that more than this degree of violence should be present before a sentence of whipping is imposed. We consider that there should be a substantial degree of actual physical violence. The word "brutality" is not exact, but it will probably help to explain what we mean. The physical violence used should involve injury which is not merely trivial or a substantial degree of pain.

In the cases before us at present, we are not of the opinion that the degree of violence employed was such as to justify a sentence of whipping. Therefore we amend the sentences in each case where whipping was imposed by omitting that part which relates to whipping. In other respects the sentences which were substantial periods of imprisonment were proper and we consider that they should stand.

ORDERS:

No. 1/53. — Leave to appeal against conviction. Conviction varied to one of armed robbery under section 397 of the Penal Code. Sentence on Lim Thiam Hen varied by omission of such part as relates to whipping. Otherwise sentences unchanged.

No. 2/53. — Sentences varied by the omission of such part as relates to whipping.

No. 4/53. — Leave to appeal against sentence. Sentence varied by omission of such part as relates to whipping.

Sentences varied.
Appeals dismissed.

P. MARIAPPAN v. NG AH BOEY.

[C. A. (Murray-Aynsley, C.J., Mathew, C.J. (F.M.) and Knight, J.) February 2, 1953]

[Singapore — Civil Suit No. 20 of 1952]

Landlord and tenant — Control of Rent Ordinance — Hypothecation of tenancy to secure loan — Whether sub-tenancy created — Mortgage of interest in premises — Control of Rent Ordinance not applicable.

The proceedings concerned a hypothecation of a tenancy held by one Abdul Rahman to secure a loan of $800 made by the appellant. The transaction took the form of a power of attorney to enable the appellant to collect rents and an agreement which purported to be a sub-demise to the appellant for 18 months. The loan was not repaid and on the expiration of the 18 months' period Abdul Rahman assigned his interest in the premises to the respondent who had no notice of the appellant's claims. The only point of substance which was argued in the Court below was as to whether a sub-tenancy was created.

Held, affirming the decision of the learned trial Judge: (1) the transaction did not amount to a sub-demise and the Control of Rent Ordinance did not apply and accordingly there was no answer to the respondent's claim; (2) it was not within the contemplation of the Control of Rent Ordinance that its protection should be given to a mere mortgagee.

CIVIL APPEAL.

N. L. Macassey for the appellant.

Claude da Silva for the respondent.

Cur. Adv. Vult.

Brown, J. [Trial Judge] : — The only point of substance in this case is whether the Agreement of 4th July, 1949, is an agency agreement or a tenancy agreement. The fact that the parties described themselves as the "tenant" and "sub-tenant" respectively has little materiality. The document must be looked at as a whole in order to determine what the parties were agreeing to.